IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEBAMOFF ENTERPRISES, INC., JOSEPH DOUST and IRWIN BERKLEY Plaintiffs,	)	
v.	)	Case No. 16-cv-08607
BRUCE RAUNER, Governor or Illinois, LISA MADIGAN, Attorney General of Illinois, CONSTANCE BEARD, Chairperson of the Illinois Liquor Control Commission and U-JONG CHOE, Executive Director of the Illinois Liquor Control Commission Defendants.	)	Hon. Samuel Der-Yeghiayan

WINE AND SPIRITS DISTRIBUTORS OF ILLINOIS'
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO INTERVENE

Proposed Intervenor Wine & Spirits Distributors of Illinois ("WSDI"), an Illinois nonprofit trade association, by its attorneys and pursuant to Rule 24 of the Federal Rules of Civil Procedure, submits the following Memorandum of Law in support of its Motion to Intervene:

I. INTRODUCTION AND SUMMARY OF BASIS FOR INTERVENTION.

WSDI is a non-profit association of state-licensed distributors (referred to herein as "distributors" or "wholesalers") of alcoholic beverages in Illinois who conduct their business in accordance of the Illinois Liquor Control Act of 1934, which governs the licensing, taxing, importation and distribution of alcohol in Illinois. 235 ILCS 5/ ("Act"). The licensing requirements of Illinois operate to curb the potential abuse of alcohol by controlling its flow in the State in order to promote the public health, safety and welfare of the citizens of Illinois, foster temperance and protect State revenue. See 235 ILCS 5/1-2; 235 ILCS 5/6-8. To best accomplish this goal, the Illinois legislature has adopted the "unquestionably legitimate" three-tier system (regulating the sale of alcohol from producers to distributors to retailers), which allows the State to "funnel sales through" said regulatory system to ensure, among other things, that "all liquor sold for use in the State be purchased from a licensed instate wholesaler." *Granholm v. Heald*, 544 U.S. 460, 489 (2005).

Invoking the Commerce Clause and Privileges and Immunities Clause, Plaintiffs challenge the constitutionality of the existing statutory framework governing Illinois' three-tier system. Plaintiff Lebamoff Enterprises, an out-of-state liquor retailer, seeks to sell alcohol directly to end consumers in Illinois, despite the fact that it is not licensed under Illinois law to do so, does not obtain its products from a licensed in-state distributor and therefore, is not subject to the tax reporting elements of the Act. If such sales are permitted, Illinois' three-tier system will collapse, as unlicensed, out-of-state merchants not subject to regulation by the State of Illinois, would be allowed to bypass Illinois' regulatory scheme and sell unlimited amounts of alcohol directly to Illinois' consumers. This would not only impair the State of Illinois Defendants' ability to promote the public health, safety and welfare of Illinois citizens, but would have unique and unfair consequences to WSDI and its members.

Indeed, in particular respects, no one would suffer greater consequences from such a ruling than WSDI and its members. In effect, by bypassing Illinois' three-tier system, Plaintiffs hope to eliminate the role of all distributors of alcohol by allowing out-of-state retailers to sell alcoholic liquor directly to consumers without first passing through the controls of Illinois' regulatory scheme. Because its members' livelihoods depend on the even playing field that has been established by the Illinois legislature, WSDI seeks to intervene in this lawsuit to defend the constitutionality of Illinois' longstanding three-tier system and prevent the direct and significant harm WSDI will suffer if Plaintiffs are permitted to obtain judicial repeal of Illinois laws. The Illinois statutes at issue constitute the valid exercise of Illinois' inherent police power to regulate the sale and distribution of alcoholic beverages in accordance with the 21st Amendment to the United States Constitution. WDSI is entitled under the Federal Rules of Civil Procedure to intervene in this matter to prevent Plaintiffs from unilaterally changing the 80-year old structure of Illinois' liquor market.

II. WSDI IS ENTITLED TO INTERVENE IN THIS ACTION AS A MATTER OF RIGHT PURSUANT TO FRCP 24(a)(2).

Intervention as of right under Rule 24(a) must be granted if: "(1) the motion to intervene is timely filed; (2) the proposed intervenors possess an interest related to the subject matter of the action; (3) disposition of the action threatens to impair that interest; and (4) the named parties inadequately represent that interest." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 657–58 (7th Cir. 2013). Courts should construe Rule 24(a)(2) liberally and should resolve doubts in favor of allowing intervention. *Michigan v. U.S. Army Corps of Engineers*, No. 10-CV-4457, 2010 WL 3324698, at *2 (N.D. Ill. Aug. 20, 2010) ("a court should not deny a motion to intervene unless it is certain that the proposed intervenor cannot succeed in its case under any set of facts which could be proved under the complaint"). In evaluating a request to intervene, courts "must accept as true the nonconclusory allegations of the motion." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995). Whether intervention as of right is warranted "is a highly fact-specific determination, making comparison to other cases of limited value." *Sec. Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). As illustrated below, WSDI has met these requirements and requests leave to intervene in this matter as of right.

A. WSDI's Application to Intervene is Timely and Causes No Prejudice.

Intervention here is timely. Timeliness turns on: (1) the length of time the intervenor knew or should have known of its interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; and (4) any other unusual circumstances. *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991), citing *South v. Rowe*, 759 F.2d 610, 612 (7th Cir. 1985). The "most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994) (petitioner filed its motion to intervene three months after it initially learned of the lawsuit; in the absence of evidence of any prejudice or that the intervenor had engaged in tactics calculated to cause delay, the court concluded the motion was timely).

To date, no discovery has been taken, no substantive rulings have been made and no motions have been heard. *See Michigan v. U.S. Army Corps of Eng'rs*, 2010 WL 3324698, at *2–3 (N.D. Ill. Aug. 20, 2010) (motion to intervene timely when filed in "earliest stages" before court "issued any substantive decisions"). WSDI has submitted this Motion, along with its required proposed pleading pursuant to Rule 24(c), attached hereto as Exhibit A, at virtually the same time as the named Defendants so as not to delay the proceedings. Thus, Plaintiffs cannot possibly claim prejudice as to the timing of this Motion. *PAC for Middle Am. v. State Bd. of Elections*, 1995 WL 571893, at *4 (N.D. Ill. Sept. 22, 1995) (no prejudice when intervention occurs prior to the start of discovery).

B. WSDI Has An Interest in the Subject Matter of This Litigation.

WSDI likewise satisfies the second requirement of Rule 24(a) because it has "a direct, significant legally protectable interest" in the subject matter of a case. *Wade v. Goldschmidt*, 673

F.2d 182, 185 (7th Cir. 1982). Whether the moving party has such an interest is determined by "focus[ing] on the issues to be resolved by the litigation and whether the potential intervenor has an interest in those issues." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322 (7th Cir. 1995). "The Seventh Circuit has stated that the interest of the prospective intervenor must be something more than a mere 'betting' interest ..., but less than a property right ... [and][w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value." *Heller Fin. Leasing, Inc. v. Gordon*, No. 03 C 6326, 2004 WL 2806458, at *8 (N.D. Ill. Dec. 3, 2004) (quotations omitted).

As an association of Illinois-licensed distributors, WSDI's members are governed by the regulatory scheme that is being attacked. The Act directly benefits and protects licensed alcoholic liquor distributors, along with other licensed members of Illinois' three-tier system, which serve as the acting agents necessary to effectuate the State's legitimate interest in promoting the public health, safety and welfare of the citizens of Illinois. If Plaintiffs' ultimately prevail in this matter, then out-of-state retailers will be able to sell alcoholic liquors to Illinois consumers without regard to this State's regulatory requirements, including the mandate that the sale of alcohol pass through the control and tax reporting hands of Illinois-licensed distributors. Such an outcome would immediately and irreparably harm Illinois-licensed distributors, who have invested heavily in bricks and mortar, logistic, inventory control and tax reporting systems and human resources to comply with Illinois law. Simply put, Illinois distributors stand to lose substantial revenue and suffer other adverse consequences if out-of-state retailers are permitted to sell non-regulated alcoholic liquor products, outside the visibility and accountability of Illinois' three-tier system. Clearly, the relief proposed by Plaintiffs would create an uneven playing field to the detriment of licensed in-state distributers, as they would be subject to Illinois' inventory controls, taxing scheme and other regulatory restrictions, whereas Plaintiffs would be permitted to bypass the three-tier system, effectively absolving them of the need to comply with such requirements.

Trade associations with purposes and interests similar to WSDI have been permitted to intervene in lawsuits that, like this one, challenge the constitutionality of state liquor laws and concern the three-tier system. See, e.g., *Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428-30 (6th Cir. 2008); *Jelovsek v. Bredesen*, 545 F.3d 431, 433 (6th Cir. 2008); *Costco Wholesale Corp. v. Hoen*, 538 F.3d 1128, 1131 (9th Cir. 2008); *Siesta Vill. Market, LLC v. Steen*, 595 F.3d 249, 251 (5th Cir. 2006); *Siesta Vill. Market, LLC v. Granholm*, 596 F. Supp. 2d 1035, 1037 (E.D. Mich. 2008); *Heald v. Granholm*, 457 F. Supp. 2d 790, 791 (E.D. Mich. 2006); *Siesta Vill. Market, LLC v. Perry*, 2006 WL 1880524, at *2 (N.D. Tex. Jul. 7, 2006). Consistent with these cases, WSDI's interests will be significantly impaired if WSDI is not allowed to intervene.

C. The Disposition of this Matter Will Impair WSDI's Interest.

With respect to the third requirement for intervention as of right, Rule 24(a)(2) requires "at least potential impairment of that interest if the action is resolved without the intervenor[.]" *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir. 2002). An "impairment" exists if the resolution of a legal question would, as a practical matter, foreclose the rights of the proposed intervenor in a subsequent proceeding. *Shea v. Angulo*, 19 F.3d 343, 347 (7th Cir. 1994). Thus, impairment under Rule 24(a)(2) is "measured by the general standards of stare decisis." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982);

American National Bank and Trust Co. of Chicago v. City of Chicago, 865 F.2d 144, 148 (7th Cir. 1989).

Here, if Plaintiffs' requested relief is granted, they would be relieved of the statutory requirement forming the foundation of Illinois' three-tier system, and unlicensed out-of-state retailers would be permitted to sell alcohol directly to Illinois consumers. Because the invalidation of such laws would bind the State of Illinois, WSDI would be similarly bound and have no recourse but to abide by the remaining, limited terms of Illinois' regulatory system. Thus, WSDI might well be precluded from bringing subsequent litigation to address and/or reverse any adverse ruling issued in the present matter. Under the Seventh Circuit's stare decisis test, a finding that the statutes at issue are unconstitutional would bind WSDI to the Court's ruling, foreclose it from litigating this issue in the future and result in adverse (perhaps fatal) economic consequences on its members. WSDI, thus, clearly satisfies this prong of intervention as of right.

D. WSDI's Interest is Not Adequately Represented by the Parties.

The final requirement for intervention as a matter of right is that the movant's interest must be inadequately represented by the existing parties to the suit. An intervenor can meet this requirement by showing "that representation of his interest 'may be' inadequate, and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Although governmental bodies ordinarily are presumed to adequately represent those they are charged by law to protect, *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007), that presumption may be rebutted based on the history between the parties, *Ligas v. Maram*, 2010 WL 1418583, at *3 (N.D. Ill. Apr. 7, 2010), or where the intervenor does not have "the same interest as" the governmental party, *United States v. S. Bend*

Cmty. Sch., 710 F.2d 394, 396 (7th Cir. 1983); See *Ind. Petr. Marketers Ass'n v. Huskey*, 2013 WL 6507002, at *6 (S.D. Ind. Dec. 11, 2013) (a "conflict between [intervenors] and the State" may "rende[r] the State's representation inadequate").

Although WSDI and the Attorney General have the same objective at the initial pleading stage – dismissal of the Complaint – the underlying interests motivating this outcome are not completely identical. "It is well-settled that regulatory agencies generally do not adequately represent the "narrow, parochial interests" of regulated entities, because agencies are charged with broad duties to the public." *Michigan v. U.S. Army Corps of Engineers*, No. 10-CV-4457, 2010 WL 3324698, at *7 (N.D. Ill. Aug. 20, 2010); quoting *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 (9th Cir.1995); see also *Chiglo v. City of Preston*, 104 F.3d 185, 187–88 (8th Cir.1997) ("the government only represents the citizen to the extent his interests coincide with the public interest. If the citizen stands to gain or lose from the litigation in a way different from the public at large, the *parens patriae* would not be expected to represent him"). The named Defendants, who regulate WSDI, are primarily concerned with defending Illinois' authority to regulate the alcoholic beverage industry as a general matter, so as to preserve its tax structure and promote the health, safety and welfare of the general public. WSDI, on the other hand, has the additional and much narrower interest of protecting the economic viability of its members and retaining the specific economic playing field that the Illinois Legislature has established through its licensing scheme.

The inherent conflict between regulator and regulated entities is oft recognized as grounds for allowing intervention. In *Cabrini-Green Local Advisory Council v. Chicago Hous. Auth.*, No. 13 CV 3642, 2014 WL 683710, at *2 (N.D. Ill. Feb. 21, 2014), a class of public housing tenants moved to intervene in support of the Chicago Housing Authority's ("CHA") plan to redevelop the Cabrini–Green site as mixed-income housing. The court found that although the proposed intervenors and CHA had the same ultimate goal in the instant litigation, their interests were nevertheless not sufficiently aligned. *Id*. at *5. The court reasoned, in part, that "although CHA's position on mixed-income housing may be aligned with proposed intervenors' interest at this moment, these entities have an extensive litigious history that indicates they do not always share the same fundamental interests." *Id*. The court ultimately found that "for over forty years, proposed intervenors and CHA have had an adversarial relationship in and out of court regarding the composition of housing in Chicago. We therefore find that proposed intervenors' interest in securing mixed-income housing for the Cabrini–Green site is not adequately represented by CHA in this case." *Id*. at *5.

Likewise, in *Michigan v. U.S. Army Corps of Engineers*, No. 10-CV-4457, 2010 WL 3324698, at *7 (N.D. Ill. Aug. 20, 2010), a group of trade associations and a sightseeing company sought to intervene as defendants in a lawsuit by several states against the U.S. Army Corps of Engineers and the Metropolitan Water Reclamation District of Greater Chicago. The states sought an injunction enjoining the named defendants from taking measures to prevent the migration of Asian carp through the Chicago Area Waterway System ("CAWS") into Lake Michigan. *Id.* at *1. The trade associations moved to intervene because their members could "lose significant business, if not cease operations entirely;" and the sightseeing company moved to intervene because it could be forced to shut down its water taxi business if the locks on the CAWS were closed. *Id*. at *5. The court allowed the parties to intervene, reasoning that the named defendants' "broad duty" as regulators to minimize the migration of Asian carp into Lake Michigan was different from the group of trade associations' interest in "protect[ing] the economic viability of its members" and the sightseeing company's interest in the "financial viability of its business." *Id.* at *8.

As in *Cabrini-Green* and *Army Corps. Engineer*, WSDI currently shares the same objective as the named regulator-Defendants, but the narrow interests, specific incentives and potentially divergent approaches warrant intervention. *Army Corps of Engineers*, 2010 WL 3324698, at *8 ("Defendants *may well face a potential conflict* of interest were they to try to represent both the general interest of the public and the financial interests of the [intervenors]") (emphasis added). Accordingly, if the case is not dismissed, strategic judgments as to how to defend the regulatory structure or the emphasis to place on one State objective in lieu of others may - and likely will - differ. The named Defendants face a wide variety of political and budgetary pressures that could lead it to pursue a litigation strategy (*e.g.* settlement, failure to appeal) that are directly at odds with the interests of WSDI. Without the right to participate, WSDI's direct interests will go undefended. WSDI has satisfied the "minimal" showing required under this prong. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972) (holding that a government agency cannot be characterized as able to represent adequately the interests of an intervenor even if the agency has substantially similar interests but also has a statutory charge to pursue potentially conflicting goals as well).

III. ALTERNATIVELY, WSDI REQUESTS THAT THE COURT GRANT PERMISSIVE INTERVENTION PURSUANT TO FRCP 24(b).

Alternatively, pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, WSDI respectfully submits that this Court should exercise its discretion and permit WSDI to intervene to defend the constitutionality of the statutes which have significant bearing on Illinois' three-tier system. Rule 24(b) of the Federal Rules of Civil Procedure states, in relevant part, as follows:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. Pro. 24(b).

It is well established that district courts have broad discretion to grant or deny motions to intervene under Rule 24(b)(2). See, e.g., *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000) ("permissive intervention under 24(b) is wholly discretionary and will be reversed only for an abuse of discretion"); *Reid v. Illinois State Bd. of Educ.*, 289 F.3d 1009, 1020 (7th Cir. 2002). In deciding whether to grant permissive intervention under Rule 24(b)(2), a court must consider whether: (1) the petition was timely; (2) a common question of law or fact exists; and (3) granting the petition to intervene will unduly delay or prejudice the adjudication of the rights of the original parties. *Southmark Corp. v. Cagan*, 950 F.2d 416, 419 (7th Cir. 1991).

All three requirements for permissive intervention are easily satisfied. First, for the reasons discussed *supra*, WSDI's petition to intervene is timely and will not unduly delay the adjudication of the rights of the Plaintiffs or original Defendants. WSDI seeks intervention at the earliest stage possible in these proceedings, shortly after the complaint has been filed and before any discovery has commenced.

Second, WSDI's claims and defenses share common issues of law and fact with the named Defendants in this lawsuit. The central issue in WSDI's defense is the constitutionality of the three-tier system and the authority of Illinois to regulate importation and distribution of alcoholic liquors by requiring all retail sales be made by licensed in-state sellers. Both WSDI and the named Defendants seek a judgment to the effect that the challenged provisions are constitutional.

Third, as discussed above, WSDI's intervention will not unduly delay or prejudice the rights of the original parties. WSDI does not raise new claims and the parties will not have to redo any discovery. It is anticipated that if WSDI is allowed to intervene to protect its legitimate interests, this action will in all material respects maintain its current posture.

Having satisfied all of the criteria for permissive intervention, WSDI submits that allowing it to intervene would serve the ends of justice more thoroughly because it is uniquely qualified to illuminate the unique relevant facts as they relate to the legal arguments presented. WSDI is intimately familiar with: (a) the statutory framework being challenged in this action; (b) the rationale and policy behind the licensed three-tier distribution system; and (c) the practical workings of the licensed three-tier distribution system, all of which knowledge will assist the Court in better understanding the issues raised and the facts relevant thereto. WSDI is also uniquely qualified to address the practical impact and implications of any ruling that would result in declaring unconstitutional any portion of Illinois liquor regulatory system. WSDI's participation would enable this Court to "address important issues in this case once, with fairness and finality." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995); see *United States v. Bd. of Sch. Comm'rs*, 466 F.2d 573, 576 (7th. Cir. 1972) (intervention by particularly affected persons promotes "consideration of all aspects of [a] societally affected legal problem").

Accordingly, WSDI should be permitted to intervene under Rule 24(b) in order to facilitate the resolution of its common claims of law and fact in one proceeding consistent with the principles of judicial economy. For these reasons, permissive intervention pursuant to Rule 24(b) is appropriate in this case.

WHEREFORE, WSDI respectfully requests that this Court enter an order permitting it to intervene in this case as a matter of right or, in the alternative, by permission of this Court.

Respectfully Submitted,
By:___ /s/ Richard J. Prendergast____
One of the Attorneys for Wine and Spirits Distributors of Illinois

Richard J. Prendergast, Esq.
Michael T. Layden, Esq.
Collin M. Bruck, Esq.
RICHARD J. PRENDERGAST, LTD. (#11381)
111 W. Washington St., Suite 1100
Chicago, Illinois 60602
(312) 641-0881

James L. Webster, Esq.
WEBSTER POWELL, P.C. (6183617)
320 W. Ohio St., Suite 501
Chicago, Illinois 60654
(312) 587-8800

Jeremy Kruidenier, Esq. (#6306375)
Vice Executive Director
WINE AND SPIRITS DISTRIBUTORS
OF ILLINOIS
27 East Monroe St., Suite 800
Chicago, Illinois 60603
(312) 782-7820